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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO: A-943

PAUL RUIZ AND EARL DENTON, PETITIONERS,

V.

STATE OF ARKANSAS, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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VS.

STATE OF ARKANSAS, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

The petitioners, Paul Ruiz and Earl Denton, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Arkansas entered in this proceeding on Marcy 29, 1982.

QUESTIONS PRESENTED

1. Whether the Arkansas death penalty statutory scheme is unconstitutional in discouraging assertion of the Fifth Amendment right not to plead guilty and needlessly penalizing exercise of the Sixth Amendment right to trial by jury.

2. Whether the State court should have allowed petitioners an opportunity to present and develop, in a post-conviction proceeding, their claims of violations under the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

OPINION BELOW

The Opinion of the Supreme Court of Arkansas was unpublished and thus is an unreported opinion. A copy of the opinion appears in Appendix B.

JURISDICTION

The Arkansas Supreme Court affirmed the convictions and sentences of petitioners on June 8, 1981, and a petition for writ of certiorari to the Supreme Court of Arkansas was denied by this Court on December 1, 1981. Subsequently, petitioners sought permission from the Supreme Court of Arkansas to seek post-conviction relief in the trial court, asserting that they were denied rights secured to them by the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States. In an unpublished opinion delivered March 29, 1982, permission to seek review was denied.

An application for an order extending time for filing this petition for writ of certiorari was filed on May 17, 1982, and an extension granted until June 27, 1982.

This Court's jurisdiction is invoked under 28 U.S.C. §1257(3), petitioners asserting here and having asserted below a deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the following constitutional and statutory provisions (quoted in relevant part only).

1. The Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

2. Act 28 of 1975, Section 1301 et seq. and Section 1307, codified as Ark. Stat. Ann. §§41-1301--41-1304, 41-1307, 41-1501(3) (Repl. 1977).

§41-1301. Trial of persons charged with capital murder. The following procedures shall govern trials of persons charged with capital murder:

(1) The jury shall first hear all evidence relevant to the charge or charges and shall then retire to reach a verdict of guilt or innocence.

(2) If the defendant is found not guilty of the capital offense charged, but guilty of a lesser included offense,

sentence shall be determined and imposed as provided by law.

(3) If the defendant is found guilty of capital murder, the same jury shall sit again in order to hear additional evidence as provided by subsection (4) hereof, and to determine sentence in the manner provided by Section 1301 [§41-1302]; except that, if the state waives the death penalty, stipulates that no aggravating circumstance exists, or stipulates that no such hearing shall be required, and the trial court shall sentence the defendant to life imprisonment without parole.

(4) In determining sentence, evidence may be presented to the jury as to any matters relating to aggravating circumstances enumerated in Section 1303 [§41-1303], or any mitigating circumstances. Evidence as to any mitigating circumstances may be presented by either the state or the defendant regardless of its admissibility under the rules governing admission of evidence in trials of criminal matters; but the admissibility of evidence relevant to the aggravating circumstances set forth in Section 1303 [§41-1303] shall be governed by the rules governing the admission of evidence in such trials. The state and the defendant or his counsel shall be permitted to present argument respecting sentencing.

§41-1302. Findings required for death sentence--unanimity required.

(1) The jury shall impose a sentence of death if it unanimously returns written findings that:

(a) aggravating circumstances exist beyond a reasonable doubt; and

(b) aggravating circumstances outweigh beyond a reasonable doubt all mitigating circumstances found to exist; and

(c) aggravating circumstances justify a sentence of death beyond a reasonable doubt.

(2) The jury shall impose a sentence of life imprisonment without parole if it finds that:

(a) aggravating circumstances do not exist beyond a reasonable doubt; or

(b) aggravating circumstances do not outweigh beyond a reasonable doubt all mitigating circumstances found to exist; or

(c) aggravating circumstances do not justify a sentence of death beyond a reasonable doubt.

(3) If the jury does not make all findings required by subsection (1), the court shall impose a sentence of life imprisonment without parole.

§41-1303. Aggravating circumstances---Aggravating circumstances shall be limited to the following:

(1) the capital murder was committed by a person imprisoned as a result of a felony conviction;

(2) the capital murder was committed by a person unlawfully at liberty after being sentenced to imprisonment as a result of a felony conviction;

(3) the person previously committed another felony, an element of which was the use or threat of violence to another person or creating a substantial risk of death or serious physical injury to another person;

(4) the person in the commission of the capital murder knowingly created a great risk of death to a person other than the victim;

(5) the capital murder was committed for the purpose of avoiding or preventing an arrest or effecting an escape from custody;

(6) the capital murder was committed for pecuniary gain; or

(7) the capital murder was committed for the purpose of disrupting or hindering the lawful exercise of any government or political function.

§41-1304. Mitigating circumstances---Mitigating circumstances shall include, but are not limited to the following:

(1) the capital murder was committed while the defendant was under extreme mental or emotional disturbance;

(2) the capital murder was committed while the defendant was acting under unusual pressures or influences or under the domination of another person;

(3) the capital murder was committed while the capacity

of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, intoxication, or drug abuse;

(4) the youth of the defendant at the time of the commission of the capital murder;

(5) the capital murder was committed by another person and the defendant was an accomplice and his participation relatively minor;

(6) the defendant has no significant history of prior criminal activity.

§41-1307. Waiver of death penalty---If a defendant is charged with capital murder, the prosecuting attorney, with the permission of the court, may waive the death penalty. In such cases, if the defendant pleads guilty to capital murder or is found guilty of capital murder after a trial to the court or to a jury, the court shall sentence the defendant to life imprisonment without parole.

§41-1501. Capital murder

(3) Capital murder is punishable by death or life imprisonment without parole pursuant to Chapter 13 [§§41-1301 - 41-1309]. For all other purposes other than disposition under Article III [§§41-801 - 41-1309], capital murder is a class A felony.

3. Act 124 of 1971, Section 2, codified as Ark. Stat. Ann. §43-2108.1(Repl. 1977).

§43-2108.1. Voluntary waiver of trial by jury---In all criminal cases where the maximum punishment is death by electrocution and the defendant waives a trial by jury, the Court must determine [that] the defendant's waiver is voluntary and is not made in response to any promise or threat and that the waiver is freely made without fear or compulsion.

4. Criminal Code, Section 172; as C & M Digest §3074; Popes Disgest §3900 as amended by Act 141 of 1953 and criminal code section 173; C & M Digest §3075; Pope's Digest §3901 codified as Ark. Stat. Ann. §§43-1220 to 43-1221 (Repl. 1977).

§43-1220. Kinds of pleas---There are but four (4) kinds of pleas to an indictment or information:

First. A plea of guilty.

Second. A plea of nolo contendere.

Third. Not guilty.

Fourth. A former conviction or acquittal of the offense charged, which may be placed with or without a plea of not guilty.

§43-1221. Plea of guilty--The plea of guilty can only be put in by the defendant himself in open court.

5. Arkansas Rules of Criminal Procedure, Rule 24.3 (Repl. 1977).

Rule 24.3. Pleading by Defendant.

(a) A plea of guilty or nolo contendere shall be received only from the defendant himself in open court, except that counsel may enter a plea of guilty on behalf of a defendant in misdemeanor cases where only a fine is imposed by the court. If the defendant is a corporation the plea may be received from counsel or an authorized corporate officer.

(b) A defendant may plead nolo contendere only with the consent of the court. The court shall not accept a plea of nolo contendere unless it is satisfied, after due consideration of the views of the parties, that the interest of the public in the effective administration of justice would thereby be served.

(c) No plea of guilty or nolo contendere shall be accepted by any court unless the prosecuting attorney of the governmental unit in which the offense occured is given opportunity to be heard at the time the plea is tendered.

6. Arkansas Rules of Criminal Procedure, Rules 31.1 -- 31.2 (Repl. 1977).

Rule 31.1. Waiver of Trial by Jury: Assent by Prosecutor.

No defendant in any criminal case may waive a trial by jury unless the waiver is assented to by the prosecuting attorney and approved by the court.

Rule 31.2. Waiver of Trial by Jury: Personal Request.

Should a defendant desire to waive his right to trial by jury, he must do so personally either in writing or in open court. A verbatim record of any proceedings at which a defendant waives his right to a trial by jury shall be made and preserved.

7. Arkansas Rules of Criminal Procedure, Rule 31.4 (Repl. 1977).

Rule 31.4. Waiver of Trial by Jury: Capital Felonies.

No defendant charged with a capital felony may waive either trial by jury on the issue of guilt or the right to have sentence determined by a jury unless:

(a) the court in which the cause is to be tried determines that the waiver is voluntarily and freely proffered without compulsion or coercion; and

(b) the prosecuting attorney, with the permission of the court, has waived the death penalty; and

(c) the prosecuting attorney has assented to the waiver of trial by jury, and such waiver has been approved by the court.

8. Arkansas Rules of Criminal Procedure, Rule 37.1 (Repl. 1977).

Rule 37.1(a) & (d). Scope of Remedy.

A prisoner, in custody under sentence of a circuit court and whose case was not appealed to the Supreme Court, claiming a right to be released, or to have a new trial, or to have the original sentence modified on the ground:

(a) that the sentence was imposed in violation of the Constitution and laws of the United States or this state; or. .

(d) that the sentence is otherwise subject to collateral attack. . .

9. Arkansas Rules of Criminal Procedure, Rule 37.2(a), (b) (Repl. 1977).

Rule 37.2. Commencement of Proceedings; Pleadings; Permission of Supreme Court Following Appeal.

(a) If the conviction in the original case was appealed to the Supreme Court, then no proceedings under this rule shall

be entertained by the circuit court without prior permission of the Supreme Court.

(b) all grounds for relief available to a prisoner under this rule must be raised in his original or amended petition. Any grounds not so raised or any grounds finally adjudicated or intelligently and understandingly waived in the proceedings which resulted in the conviction or sentence or in any other proceedings that the prisoner may have taken to secure relief from his conviction or sentence may not be the basis for a subsequent petition.

10. Arkansas Rules of Criminal Procedure, Rule 37.3 (Repl. 1977).

Rule 37.3. Nature of Proceedings; Summary Disposition; Appointment of Counsel; Evidentiary Hearings; Presence of Petitioner.

(a) If the motion and the files and records of the case conclusively show that the petitioner is entitled to no relief, the trial court shall make written findings to that effect, specifying any parts of the files or records that are relied upon to sustain the court's findings.

(b) If the original motion, or a motion to take an appeal from the court's findings under subsection (a) hereof, should allege that the prisoner is unable to pay the cost of the proceedings, or to employ counsel, and if the court is satisfied that this allegation is true, the circuit court shall appoint counsel for the prisoner for hearing in the circuit court and for an appeal to the Supreme Court.

(c) When a motion is filed in the circuit court mentioned in Rule 37.1, and the court does not dispose of the motion under subsection (a) hereof, the court shall cause notice of the filing thereof to be served on the prosecuting attorney; and on the motion the court shall grant a prompt hearing with proceedings reported. Objections to the court's rulings are required, but exceptions need not be saved. The court shall determine the issues and make written findings of fact and conclusions of law with respect thereto. If the prisoner desires to be present at the hearing for taking testimony the court shall order his presence.

STATEMENT OF THE CASE

Petitioners Paul Ruiz and Earl Denton were charged by amended information filed November 18, 1977, with capital murder in violation of Ark. Stat. Ann. §1501, Ark. Stat. Ann. §1501 (Repl. 1977).

Trial by jury began on September 18, 1979 and was concluded on October 3, 1979. Petitioners were represented by two court appointed attorneys in the guilt phase of the trial. The State introduced evidence which established that petitioners shot and killed Marvin Ritchie, a town marshall and Opal James, a park ranger. No evidence was presented as to which of petitioners actually fired the fatal shots. The jury found petitioners guilty as charged.

In the sentencing phase of their trial, petitioners were represented by one court appointed attorney. The State presented testimony that petitioners had escaped from a penitentiary in 1977, and counsel stipulated to introduction of petitioners' prior criminal records. The defense presented several witnesses, each of whom testified about both petitioners. A clergyman testified briefly about the background of both Paul Ruiz and Earl Denton and stated that each was able to care for others even in a penitentiary environment and that both should be allowed to live. Psychological testimony was that petitioner Ruiz suffered from an anti-social personality and petitioner Denton was a schizoid personality with some paranoid features, that such disorders developed from early emotional deprivation, and that increased anxiety would impair the ability of petitioners to conform their conduct to the law.

The jury delivered findings that five aggravating circumstances did exist beyond a reasonable doubt, that there was no evidence of any mitigating circumstances, and that petitioners were to die by electrocution.

Upon completion of testimony in the penalty phase of trial, petitioners responded to questions of one of the attorneys representing petitioners in the guilt phase. Counsel stated

on the record that all three attorneys had discussed at length with petitioners the possibility of a conflict due to joint representation by attorneys on the guilt phase and by the attorney responsible for the sentencing phase of trial. He asked each of the petitioners if, in fact, the possibility of a conflict was discussed with them. Both responded in the affirmative and indicated they had no objection to joint representation. At the conclusion of trial and before petitioners were allowed to exercise their right of allocution, the court asked each of the petitioners if he was satisfied with the legal representation received. Both indicated they were.

Petitioners' convictions and sentences were affirmed, Ruiz vs. State, 273 Ark. 94, 617 S.W.2nd 6 (1981), and rehearing was denied by the Arkansas Supreme Court on July 6, 1981. Petitioners sought review by petition for writ of certiorari from the Supreme Court of the United States, which petition was denied on December 1, 1981.

Subsequently, through present counsel, petitioners sought permission to seek post-conviction relief contending that: (1) the Arkansas death penalty statute is facially unconstitutional, since it discourages assertion of the Fifth Amendment right not to plead guilty and penalizes exercise of the Sixth Amendment right to trial by jury; (2) petitioners sentences were imposed in violation of their Sixth, Eighth and Fourteenth Amendment rights to counsel at the penalty stage of their trial. Petition to seek review of these contentions was denied by the Supreme Court of Arkansas.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

Petitioners' questions arise from their contentions in the Arkansas Supreme Court that the Arkansas death penalty statute denied them rights secured by the Fifth and Sixth Amendments and that they were denied the right to effective assistance of

counsel as guaranteed by the Sixth, Eighth and Fourteenth Amendments. Permission to proceed for post-conviction review of these contentions was denied and the contentions were summarily rejected.

The Arkansas Supreme Court stated that the issues presented by petitioners must be considered waived since neither was raised in accordance with controlling rules of procedure. Ruiz vs. State, No. 80-147, slip op. at 2 (S.Ct.Ark. Mar. 29, 1982). (Attached hereto as Appendix B) The court, however, did address on its merits the issue of unconstitutionality of the Arkansas death penalty statute, finding that the principle set forth in United States vs. Jackson, 390 U.S. 570, 885 S.Ct. 1209, 20 L.Ed.2nd 138 (1968), upon which petitioners relied, had been erroded and was not controlling. Ruiz vs. State, Id. at 2-3.

With respect to denial of permission to proceed with an evidentiary hearing on the issue of ineffectiveness of counsel, the court stated that petitioners offered no facts to show that their acquiescence to joint representation by counsel was not intelligently and voluntarily given. Ruiz vs. State, Id. at 4-5. The court stated further that no specific evidence of prejudice was provided in petitioners' motion, thus, petitioners did not demonstrate by clear and convincing evidence that they were denied a fair trial. Ruiz vs. State, Id. at 5.

REASONS FOR GRANTING THE WRIT

A.

THE ARKANSAS DEATH PENALTY STATUTE IS FACIALLY UNCONSTITUTIONAL SINCE IT DISCOURAGES ASSERTION OF THE FIFTH AMENDMENT RIGHT NOT TO PLEAD GUILTY AND PENALIZES EXERCISE OF THE SIXTH AMENDMENT RIGHT TO TRIAL BY JURY.

In accordance with the Arkansas death penalty statute, a defendant who chooses to exercise his Sixth Amendment right to a trial by jury faces the possibility of imposition of the death penalty. Under the applicable statute, capital murder is punishable by life imprisonment without parole or death, Ark. Stat. Ann. §41-1501(e)(Repl. 1977), and the sentence

determination is governed by the procedures set forth in Ark. Stat. Ann. §41-1301 et seq., Ark. Stat. Ann. §§41-1301, 41-1302, 41-1307 (Repl. 1977). Ark. Stat. Ann. §41-1301(1) provides that the jury shall first hear all evidence relevant to the charge and then shall retire to render a verdict of guilt or innocence of the capital charge. If the verdict is guilty, "the same jury shall sit again" to hear additional evidence and determine sentence, (emphasis added). The same jury must impose a sentence of death if it unanimously finds beyond a reasonable doubt that: (1) aggravating circumstances exist; (2) aggravating circumstances outweigh all mitigating circumstances found to exist; and (3) aggravating circumstances justify a sentence of death. Ark. Stat. Ann. §41-1302(1) (Repl. 1977). If that jury does not make those three findings, a sentence of life imprisonment without parole must be imposed. Ark. Stat. Ann. §41-1302(2)(Repl. 1977).

Under the Arkansas statutory framework, the penalty of death can only be imposed by a jury which makes the findings required under Ark. Stat. Ann. §41-1302(1). Ark. Stat. Ann. §41-1302(1)(Repl. 1977), and that jury must be the same jury that determined the defendant's guilt. Ark. Stat. Ann. §§41-1301(1), 41-1301(3)(Repl. 1977). The trial court may never impose a sentence of death, but is required to impose a sentence of life imprisonment without parole in the following circumstances:

(a) when the State waives the death penalty or stipulates the jury cannot, on the evidence, make the required findings under Ark. Stat. Ann. §41-1302, ARK. STAT. ANN. §41-1301(3)(Repl. 1977);

(b) when the jury does not make the findings under Ark. Stat. Ann. §41-1302, ARK. STAT. ANN. §41-1302(3)(Repl. 1977);

(c) when the prosecuting attorney, with the court's permission, waives the death penalty and (i) the defendant pleads guilty, or (ii) the defendant is found guilty after trial to the court or to a jury, ARK. STAT. ANN. §41-1307 (Repl. 1977).

Upon the face of the Arkansas statutory scheme it is clear that only the same jury which determines guilt is authorized to return a verdict of death; and the statute sets forth no procedure for imposing the death penalty upon a defendant who waives the right to a jury trial or upon one who pleads guilty.

While a defendant has no constitutional right to enter a plea of guilty, a state may confer such a right by statute or other means. North Carolina vs. Alford, 400 U.S. 25, 38 n.11, 91 S.Ct. 160, 168 n.11, 27 L.Ed.2nd 162 (1970). In Arkansas, as established by statute and rules, a defendant has a right to plead guilty and a right to waive trial by jury, ARK. STAT. ANN. §43-2108.1 (Repl. 1977); ARK. STAT. ANN. §43-1220 -- 43-1221 (Repl. 1977); ARK. R. CRIM. P., §§ 24.3, 31.1, 31.2, 31.4. Rule 31.4 limits the scope of the capital defendant's right to waive a jury trial. That rule provides:

> "No defendant charged with a capital felony may waive either trial by jury on the issue of guilt or the right to have sentence determined by jury unless:
>
> (a) the court in which the cause is to be tried determines that the waiver is voluntarily and freely proffered without compulsion or coercion; and
>
> (b) the prosecuting attorney, with the permission of the court, has waived the death penalty; and
>
> (c) the prosecuting attorney has assented to the waiver of trial by jury, and such waiver has been approved by the court."

Rule 31.4 clearly makes it impossible for a capital defendant to waive a jury trial or jury sentencing in a bifurcated proceeding, see generally, ARK. STAT. ANN. §41-1301(3), unless the death penalty has been waived by the prosecutor with permission of the court. Only the same jury which determines guilt can impose a sentence of death, see, ARK. STAT. ANN. §41-1501(3)(Repl. 1977), whereas there can be no trial by the court or sentencing by the court unless the death penalty has been waived. In such cases, if the defendant pleads guilty or is found guilty after a trial to the court or to a jury, the court must sentence the defendant to life imprisonment without parole. ARK. STAT. ANN. §41-1307(Repl. 1977).

It appears, therefore, that under the Arkansas statutory

scheme, the severity of punishment is dependent upon the way guilt is determined--e.g., by a plea of guilty, by a bench trial, or by a jury trial. The defendant who abandons his right to contest his guilt before a jury is assured that he cannot be executed, while the defendant desirous of seeking a jury acquittal stands forewarned that, if the jury finds him guilty, and does not wish to spare his life, he will die. Such a procedure thereby imposes a impermissible burden on the exercise of constitutional rights, since the inevitable effect of the statutory provisions "is, of course, to discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial." United States vs. Jackson, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2nd 138 (1968). See also, State vs. Frampton, 95 Wash.2nd 469, 627 P.2nd 922 (1981); State vs. Martin, 94 Wash.2nd 1, 614 P.2nd 164 (1980). A statute, such as the one presently in effect in Arkansas, which encourages guilty pleas and discourages the exercise of constitutional rights is facially unconstitutional and is unconstitutional as applied to any defendant who pleads guilty or is found guilty by a jury. Id.

Though the Supreme Court of Arkansas has stated in its opinion below that Jackson is not controlling and has been erroded, Ruiz vs. State, No. 80-147, slip op. at 2-3 (S.Ct. Ark. Mar. 29, 1982)(Attached hereto as Appendix B), petitioners assert that the principle announced in that case has continuing viability and is fully applicable to the present case. These statements by the Arkansas court are accompanied by no authority, except that the court in its opinion cites to the dissenting opinion in Corbitt vs. New Jersey, 439 U.S. 212, 99 S.Ct. 492, 58 L.Ed.2nd 466 (1978). Ruiz vs. State, Id. at 4. A capital sentencing scheme is unconstitutional where, as here, the death sentence can only be imposed upon a recommendation of a jury accompanying a guilty verdict, whereas the maximum penalty for those tried to the court after waiving a jury and for those pleading guilty is life imprisonment. This principle, as it

relates to capital sentencing schemes, was apparently reaffirmed in Corbitt vs. New Jersey, 439 U.S. 212, 99 S.Ct. 492, 58 L.Ed.2nd 466 (1977). In refusing to extend the rationale of Jackson to the facts presented in Corbitt, this Court emphasized the continuing viability of the decision in Jackson in the capital sentencing context:

> "We agree with the New Jersey Supreme Court that there are substantial differences between this case and Jackson, and that Jackson does not require a reversal of Corbitt's conviction. The principle difference is that the pressures to forego trial and to plead to the charge in this case are not what they were in Jackson. First, the death penalty, which is "unique in its severity and irrevocability," Gregg vs. Georgia, 428 U.S. 153, 187, 96 S.Ct. 2909, 49 L.Ed.2nd 859 (1976, is not involved here. Although we need not agree with the New Jersey court that the Jackson rationale is limited to those cases where a plea avoids any possibility of the death penalty's being imposed, it is a material fact that under the New Jersey law the maximum penalty for murder is life imprisonment, not death. Furthermore, in Jackson, any risk of suffering the maximum penalty could be avoided by pleading guilty. Here, although the punishment when a jury finds a defendant guilty of first degree murder is life imprisonment, the risk of that punishment is not completely avoided by pleading non vult because the judge accepting the plea has the authority to impose a life term. New Jersey does not reserve the maximum punishment for those who insist on a jury trial.

Corbitt vs. New Jersey, 439 U.S. 217, 99 S.Ct. 492, 58 L.Ed.2nd 466 (1979)(emphasis added).

The key to the holding in Jackson is that a statutory scheme cannot constitutionally impose an impermissible burden upon the assertion of constitutional rights. United States vs. Jackson, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2nd 138 (1968). See, State vs. Frampton, 95 Wash.2nd 469, 627 P.2nd 922 (1981). A statute simply cannot impose a penalty such as death in a manner that needlessly penalizes the assertion of those rights. See, Griffin vs. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2nd 106 (1965). Specifically, with regard to the Arkansas statutory scheme, the death penalty may be imposed upon a capital defendant only through exercise of his Sixth Amendment right to a trial by jury.

The fact that the Arkansas Supreme Court stated in Collins vs. State, 261 Ark. 195, 548 S.W.2nd 106 (1977), that a trial judge is not required to impose the death sentence in every case in which the jury prescribes it, but may reduce the sentence

if it is deemed excessive, is not relevant under the rationale of Jackson. The fact remains that under the Arkansas statutory scheme a defendant that pleads guilty or waives a trial by jury cannot receive the death penalty whereas a defendant who exercises his right to a jury trial may. That is the constitutionally impermissible burden imposed upon the capital defendant. The existence of a remote and highly unlikely possibility that the trial court may reduce the sentence of death which can be imposed only be exercise of the right to trial by jury, does not lessen that burden, particularly in light of the fact that petitioners are unaware of any such reduction in the entire history of the Arkansas death penalty statute.

Under the Arkansas statute, a defendant is cognizant of the fact that the jury--and only the jury--is authorized to say he shall die. Any statute which makes the imposition of a death sentence only possible for those who assert their right to contest guilt before a jury unconstitutionally chills the assertion of basic constitutional rights. See, United States vs. Jackson, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2nd 138 (1968); State vs. Frampton, 95 Wash.2nd 469, 627 P.2nd 922 (1981). Having that prohibited effect, the Arkansas statutory scheme is repugnant to the Constitution of the United States.

B.

PETITIONERS WERE DENIED AN OPPORTUNITY TO PRESENT AND DEVELOP, IN A POSTCONVICTION PROCEEDING, THEIR CLAIMS OF VIOLATIONS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

The Arkansas Supreme Court, in denying petitioners' permission to proceed with an evidentiary hearing on the issue of ineffective assistance of counsel indicated that petitioners were procedurally barred from raising the issue in a post-conviction proceeding. Ruiz vs. State, No. 80-147, slip op. at 2 (S.Ct.Ark. Mar. 29, 1982)(Attached hereto as Appendix B) It is, of course, without question that this Court will not review a decision of a state court which rests on adequate and

independent non federal grounds, Bell vs. Maryland, 378 U.S. 226, 84 S.Ct. 1814, 12 L.Ed.2nd 822 (1964); Smith vs. Smith, 366 U.S. 210, 81 S.Ct. 1050, 6 L.Ed.2nd 233 (1961), and that it is for this Court to ascertain the actual basis of the state court decision and whether a non federal ground properly supports a judgment so as to preclude review. See, NAACP vs. Alabama, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2nd 1488 (1958); Guaranty Trust Co. vs. Blodgett, 287 U.S. 509, 53 S.Ct. 244, 77 L.Ed. 463 (1932). However, petitioners herein respectfully assert that if the decision of the Arkansas court does in fact rest on procedureal non federal grounds, such grounds do not adequately support the judgment.

Since a federal right cannot be denied on insubstantial grounds, a procedural bar to review in this Court must have fair and substantial support. Ward vs. Love County, 253 U.S. 17, 22, 40 S.Ct. 419, 64 L.Ed. 751, 758 (1920); Wolfe vs. North Carolina, 364 U.S. 177, 80 S.Ct. 1482, 4 L.Ed.2nd 1650 (1960) reh. denied, 364 U.S. 856, 81 S.Ct. 29, 5 L.Ed.2nd 80 (1960); Staub vs. Baxley, 355 U.S. 313, 78 S.Ct. 277, 2 L.Ed.2nd 302 (1958). The Arkansas court in the instant case said "the issues were not raised in accordance with controlling rules of procedure and must be considered waived." Ruiz vs. State, No. 80-147, slip op. at 2 (S.Ct.Ark. Mar. 29, 1982)(Attached hereto as Appendix B). In support of this statement, the Court cited Moore vs. Illinois, 408 U.S. 786, 92 S.Ct. 2562, 33 L.Ed.2nd 706 (1972), Stembridge vs. Georgia, 343 U.S. 541, 72 S.Ct. 834, 96 L.Ed. 1130 (1952), Williams vs. Edmondson, 257 Ark. 837, 250 S.W.2nd 260 (1975), and Orman vs. Bishop, 245 Ark. 887, 435 S.W.2nd 440 (1968), all of which state that an issue cannot be presented for the first time on appeal. That rule would appear to have no relevancy to a request for a hearing on postconviction relief. The court below relies also on its decision in Hulsey vs. State, 268 Ark. 312, 595 S.W.2nd 934, reh. denied, 268 Ark. 315, 599 S.W.2nd 729 (1980), where is said that contentions not raised on direct

appeal are waived and cannot be raised in a proceeding for post-conviction relief. To substantiate that position, the court in Hulsey relied upon Sarko vs. Edwards, 252 Ark. 1082, 482 S.W.2nd 262 (1972), a civil appeal from a judgment entered in accordance with a jury verdict. The defendant appellant in that case contended that the statute of frauds made the contract unenforceable but did not support the contention by argument on appeal. Thus, the court pointed out that those issues not argued on appeal are waived. That well accepted principle also seems to have little to do with proceedings for postconviction relief. The Arkansas court, however, relying in part on its opinion in Hulsey makes the statement in Neal vs. State, 270 Ark. 442, 605 S.W.2nd 421 (1980), that the Arkansas post-conviction procedural rule is not intended to permit the petitioner to present questions which were passed upon direct appeal. The Arkansas rule does state:

> "All grounds for relief available to a prisoner under this rule must be raised in his original or amended peititon. Any grounds not so raised or any grounds finally adjudicated or intelligently and understandingly waived in the proceedings which resulted in the conviction or sentence or in any other proceedings that the prisoner may have taken to secure relief from his conviction or sentence may not be the basis for a subsequent petition."

ARK. R. CRIM. P., §37.2. The court further states in Neal that neither does the postconviction procedure permit an prisoner to raise questions which might have been raised at trial or on direct appeal. In Douglas vs. Alabama, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2nd 934 (1965) this Court stated that a state procedural bar to review of federal rights must be reasonable. The Arkansas court has created an impossible dilemma for prisoners who seek postconviction relief. One cannot seek relief for questions presented upon direct appeal. ARK. R. CRIM. P., § 37.2, and one cannot seek relief for questions not presented upon direct appeal. In the face of such a ruling, and in a case where federal constitutional rights are in question and where the prisoner's sentence is death by electrocution, the petitioner is left in a position

of helpless confusion and frustration. In justification of its position the Arkansas Supreme Court has stated that contentions not raised at trial or thereafter on first appeal are waived so that criminal prosecutions in Arkansas courts may have finality. Hulsey vs. State, 268 Ark. 312, 595 S.W.2nd 934 (1980). It is well established that a state procedural rule barring review of federal rights must have a legitimate state purpose. Douglas vs. Alabama, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2nd 934 (1965); Henry vs. Mississippi, 379 U.S. 443, 85 S.Ct. 564, 13 L.Ed.2nd 408 (1965); NAACP vs. Alabama, 377 U.S. 288, 84 S.Ct. 1302, 12 L.Ed.2nd 325 (1964). The Arkansas court is indicating in Hulsey that decisions in capital cases must be final so that the purpose or end of finality may be served. The punishment of death is certainly final, and to prevent presentation of rights under the United States Constitution for those persons who have received such a sentence does serve the purpose of finality. Yet, in so doing, such a rule appears to stand, not as a legitimate state purpose, but as a rule so unfounded as to be essentially arbitrary--a rule used to prevent review of a claim of federal rights. See, Enterprise Irrigation Dist. vs. Farmers Mut. Canal Co., 243 U.S. 153, 37 S.Ct. 318, 61 L.Ed. 644 (1916).

Additionally, petitioners contend that they justifiably relied upon prior decisions of the Arkansas court which are difficult to reconcile with the holding in the case at hand. This Court has said that an adequate non federal ground must be well established so that one may be fairly apprised thereof, see, NAACP vs. Alabama, 377 U.S. 288, 84 S.Ct. 1302, 12 L.Ed.2nd 325 (1964), and that novelty in procedural requirements cannot be permitted to thwart review in the United States Supreme Court, applied for by those who, in justified reliance upon prior decisions, seek vindication in the federal courts of their federal constitutional rights. NAACP vs. Alabama, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2nd 1488 (1958).

In Blackmon vs. State, 268 Ark. 316, 595 S.W.2nd 689 (1980), an appeal from denial by the trial court of a hearing

on postconviction relief, the Supreme Court held that where the record did not conclusively show that appellant was not entitled to a hearing on his allegation of ineffective assistance of counsel, the trial court should have granted the hearing. See, Cusick vs. State, 259 Ark. 720, 536 S.W.2nd 119 (1976); Cullens vs. State, 252 Ark. 995, 482 S.W.2nd 95 (1972); see also, Cross vs. United States, 392 F.2nd 360 (8th Cir. 1968). The court further related that an evidentiary hearing in the trial court better equips the appellate court on review to examine in detail the sufficiency of the representation below. Rule 37.3 of the Arkansas Rules of Criminal Procedure provides that a motion for postconviction relief may be disposed of without an evidentiary hearing by the trial court only if the motion and the files and records of the case conclusively demonstrate petitioner is not entitled to relief requested. ARK. RULES CRIM. PRO., Rule 37.3. This rule is a directive to the trial judge, to be utilized whenever a petition is before him. Prisoners who have not taken appeal file such petitions directly with the trial court. ARK. RULES CRIM. PRO., Rule 37.1. When, as in the instant case, the prisoner has taken appeal, since the trial court has lost jurisdiction, he must ask permission of the Supreme Court to present his petition to the trial court. ARK. RULES CRIM. PRO., Rule 37.2. Rule 37.3, therefore, should be applicable to all cases whether or not appeal has been taken. Regardless of that rule, the Arkansas Court has ruled that an evidentiary hearingis necessary for determination of ineffective asisstance of counsel. In Hilliard vs. State, 259 Ark. 81, 531 S.W.2nd 463 (1976), the appellant on direct appeal to the Arkansas Supreme Court presented the issue of ineffective assistance of counsel. The court decided that the contention could not be considered on first appeal but that appellant had the right to raise the question in the trial court before appeal or subsequently by motion for postconviction relief. The court's rationale for its decision was that an evidentiary hearing on the matter would better equip the Supreme Court

on review to examine in detail the sufficiency of representation below. Furthermore, it is frequently noted by the Arkansas court that a prisoner is to be afforded a postconviction remedy in any case where the sentence was imposed in violation of the Constitution of the United States or is otherwise subject to collateral attack. Swindler vs. State, 272 Ark. 340, 617 S.W.2nd 1 (1981); Collins vs. State, 271 Ark. 825, 611 S.W.2nd 182 (1981); Hulsey vs. State, 268 Ark. 312, 595 S.W.2nd 934, reh. denied, 268 Ark. 315, 599 S.W.2nd 729 (1980); Swisher vs. State, 257 Ark. 24, 514 S.W.2nd 218 (1974); Thacker vs. Urban, 246 Ark. 956, 440 S.W.2nd 553 (1969); Clark vs. State, 242 Ark. 584, 414 S.W.2nd 601 (1967). See. ARK. R. CRIM. P., Rule 37.1. Petitioners, therefore, contend that in reliance upon these decisions, they plainly and reasonably attempted to assert their Federal rights and that such reliance was justified. "Whatever springes the state may set for those who are endeavoring to assert rights that the state confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." Davis vs. Wechsler, 263 U.S. 22, 24, 44 S.Ct. 13, 68 L.Ed. 143 (1923).

For these and the foregoing reasons, petitioners reiterate that the State of Arkansas has not set forth a state ground for its decision adequate to bar review in this Court.

Petitioners' request of the court below was that they be allowed permission to proceed for an evidentiary hearing in the trial court on the issue of ineffective assistance of counsel. Specifically, they alleged that joint representation by a singular attorney in the sentencing phase of their trial caused them to be deprived of their rights under the Sixth and Fourteenth Amendments to effective assistance of counsel at the sentencing phase of their trial, see, Gardner vs. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2nd 393 (1977), and their right under the Eighth Amendment to have the jury consider as mitigating factors, any relevant aspect of their individual characters or backgrounds and any circumstances of their offense. Lockett vs. Ohio, 438 U.S. 586, 98 S.Ct. 2954,

57 L.Ed.2nd 973 (1978); see generally, Gregg vs. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2nd 859 (1976). After ruling that the issue was waived because not raised in accordance with controlling rules of procedure, the court noted that the Arkansas court had adopted a different standards of review of ineffective assistance of counsel than has the Eighth Circuit and stated that petitioners offered no facts to show they did not intelligently and voluntarily acquiesce to joint representation and that they had not shown clear and convincing evidence of prejudice. Ruiz vs. State, No. 80-147, slip op. at 4-5 (Ark.S.Ct. Mar. 29, 1982)(Attached hereto as Appendix B). It is quite certain that in Arkansas a charge of inadequate representation can prevail only if the acts or omissions of an accused's attorney result in making the proceedings a "farce and a mockery of justice, shocking the conscience of the Court. . .", Sheppard vs. State, 255 Ark. 40, 498 S.W.2nd 668 (1973); Leasure vs. State, 254 Ark. 961, 497 S.W.2nd 1 (1973), while the test for incompetency in the Eighth Circuit Court of Appeals is whether counsel failed to exercise the skill and diligence of a reasonably competent attorney. McQueen vs. Swenson (McQueen III), 560 F.2nd 959, 961 (8th Cir. 1977); Thomas vs. Wyrick, 535 F.2nd 407, 414 (8th Cir. 1976); McQueen vs. Swenson (McQueen I), 498 F.2nd 207, 220 (8th Cir. 1974). However, petitioners referred to such tests in the court below and do so here,only to make a distinction between incompetence of counsel and multiple representation by counsel, both of which may be the basis of a claim under the Sixth Amendment of the Constitution of the United States. The standards above are for determination of competency. Multiple or joint representation is a different matter.

Representation of more than one defendant by the same lawyer does not necessarily constitute a deprivation of effective assistance of counsel. It is not a violation of one's rights for his attorney to also represent a codefendant so long as the representation is effective and does not present a

conflict of interest operating to the prejudice of the accused. Glasser vs. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680, reh. denied, 315 U.S. 827, 62 S.Ct. 629, 86 L.Ed. 1222 (1941). See, ABA Standards, Defense Function §4-3.5(b). In Holloway vs. Arkansas, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2nd 426 (1978), this Court had occasion to deal with an instance of multiple representation. There is was decided that whenever a trial court improperly requires, over timely objection, a single attorney to represent codefendants, reversal is automatic and prejudice is presumed regardless of whether proof of a conflict of interest was independently shown. In that situation there is no requirement that a defendant show that a conflict of interest--which he and his counsel tried to avoid by timely objections to the joint representation,prejudiced him in some specific fashion. Petitioners are aware, however, that multiple representation in the sense that the same counsel actively represented multiple defendants does not violate the Sixth Amendment unless it gives rise to a conflict. Cuyler vs. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2nd 333 (1980). In this case neither petitioners nor counsel for the sentencing phase of their trial voiced their objections to the multiple representation. In order to establish a Sixth Amendment violation arising from multiple representation by an attorney, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance, and until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim. Cuyler vs. Sullivan, Id. Present counsel for petitioners alleged in petitioners' motion to the Arkansas Supreme Court the existence of a conflict of interest in the sentencing phase of petitioners capital murder trial. The motion indicated that mitigating factors should have been separately and independently presented for each petitioner since their backgrounds and psychological profiles were dissimilar and their past criminal records distinguishable. Additionally,

it was alleged that circumstances surrounding the crime were not the same with regard to each defendant and that counsel was precluded by his conflict in representation from presenting the differing degree of culpability of the two defendants as a mitigating factor for the one less culpable. No specific evidence was provided, since counsel anticipated the possible necessity of her appointment in the trial court to represent one of the petitioners at the evidentiary hearing requested by the motion. Present counsel herself had a potential conflict of interest. Had counsel done more than assert her knowledge of the existence of the conflict at the sentencing phase of petitioners' trial and pursued with both petitioners the detailed factual basis thereof, she could have represented neither petitioner at a hearing on the merits of their claim.

The Arkansas court correctly observed that petitioners in their motion presented no evidence to show that their acquiescence to joint representation was not voluntarily and intelligently given. Ruiz vs. State, No. 80-147, slip op. at 5 (Mar. 29, 1982)(Attached hereto as Appendix B). It is difficult to understand how one can waive right to counsel after the trial is completed, see generally, Uvegas vs. Pennsylvania, 335 U.S. 437, 69 S.Ct. 184, 93 L.Ed. 127 (1948), but where right to counsel is of such critical importance as to be an element of due process, a finding of waiver is not lightly to be made, Westbrook vs. Arizona, 384 U.S. 150, 86 S.Ct. 1320, 16 L.Ed.2nd 429 (1966); Moore vs. Michigan, 355 U.S. 155, 78 S.Ct. 191, 2 L.Ed.2nd 167 (1957), and generally an issue of waiver depends on facts and circumstances of a particular case, North Carolina vs. Butler, 441 U.S. 369, 99 S.Ct. 1755, 60 L.Ed.2nd 286 (1979). One factor, such as is not conclusive, Id., and all of the facts and circumstances can only be presented at an evidentiary hearing.

With regard to the comment by the Arkansas court that a petitioner must show by clear and convincing evidence that

the prejudice which resulted from the representation of trial counsel was such that he did not receive a fair trial, Ruiz va. State, No. 80-147, slip op. at 5 (Ark.S.Ct. Mar. 29, 1982), (Attached hereto as Appendix B), but see, Eddings vs. Oklahoma, _____U.S._____, 102 S.Ct. 869, 71 L.Ed.2nd_____(1982), petitioners contend that, the rule for incompetency cases notwithstanding, prejudice is not the issue here. Unconstitutional multiple representation is never harmless error, and accordingly a defendant shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief, the conflict itself demonstrating a denial of the right to have effective assistance of counsel. Cuyler vs. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2nd 333 (1980). Petitioners'request in the Arkansas Supreme Court was merely for an evidentiary hearing to show that such a conflict was present at the sentencing phase of their trial.

It is petitioners' understanding that they are entitled to such a hearing. Petitioners are cognizant that this Court has not decided whether the Fourteenth Amendment requires that the States afford state prisoners some adequate corrective process for hearing and determination of claims of violation of federal constitutional guarantees, Case vs. Nebraska, 381 U.S. 336, 85 S.Ct. 1486, 14 L.Ed.2nd 422 (1965), the necessity of that decision having been obviated by Nebraska's adoption of just such a statute. Arkasnas too has adopted a procedure which, on its face, provides for hearing and determination of federal constitutional claims. See, ARK. RULES, CRIM. PRO., Rule 37. In Case this Court took notice that a problem existed because in some jurisdictions prisoners were altogether precluded from access to the courts and in many more, the procedures recognized by state law failed to provide genuine opportunities for testing constitutional issues, with the result that prisoners often failed to obtain hearings on their allegations in state courts. Not wishing to belabour the obvious, petitioners herein reiterate that a genuine opportunity to test their claims under the United

States Constitution were denied them by the Supreme Court of Arkansas. Long ago this Court made it clear that states must afford some clearly defined method by which prisoners may raise calims of denial of federal rights, Young vs. Ragen, 337 U.S. 235, 69 S.Ct. 1073, 93 L.Ed. 1333 (1949), since the doctrine of exhaustion of state remedies. . .presupposes that some adequate state remedy exists. Id. That remedy should provide for full fact hearings to resolve disputed factual issues, and for compilation of a record to enable federal courts to determine the sufficiency of those hearings. Id. (concurring opinion); Townsend vs. Sain, 372 U.S. 293, 312-318, 83 S.Ct. 745, 9 L.Ed.2nd 770, 785-788 (1963). Petitioners thus reassert that such a hearing should have been granted them by the court below for presentment of their claims under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

CONCLUSION

For the reasons set forth, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Arkansas.

RESPECTFULLY SUBMITTED,

BY: Sandra T. Berry

SANDRA TRAWICK BERRY
Attorney at Law
2020 S. Broadway
Little Rock, Arkansas 72206

COUNSEL FOR PETITIONERS

LAW OR CHANCERY MANDATE

STATE OF ARKANSAS, In the Supreme Court } SCT.

BE IT REMEMBERED, That at a term of the Supreme Court of the State of Arkansas, begun and held at the Court Room in the City of Little Rock, on the 5th day, being the first Monday of October, A. D. 1981, amongst others were the following proceedings, to-wit:

On the 29th day of March, A. D. 1982, a day of said term

PAUL RUIZ AND EARL DENTON

No. CR80-147 vs. Petitioners

STATE OF ARKANSAS

Respondent

Appeal from Conway Circuit Court

District

Appellants' petition for permission to proceed pursuant to Rule 37 is denied. See per curiam this date.

Mandate issued.

IN TESTIMONY, That the above is a true copy of the order of said Supreme Court, rendered in the case therein stated, I, Dona L. Williams, Clerk of said Supreme Court, hereunto set my hand and affix the Seal of said Supreme Court, at my office in the city of Little Rock, this 29th day of March, A.D. 1982

Dona L. Williams

CLERK

By

D.C.

APPENDIX "B"

the first place and thought it was improper under the facts which had been presented to the jury.

I would reverse and remand the case for a new trial.

CRIMINAL — Petition to proceed under Crim. Proc. Rule 37.

Paul RUIZ & Earl DENTON v. STATE of Arkansas

CR 80-147

Supreme Court of Arkansas
Opinion delivered March 29, 1982

Petition for permission to proceed in circuit court under Criminal Procedure Rule 37; petition denied.

Sandra Trawick Berry, for appellants.

Steve Clark, Atty. Gen., by: *Victra L. Fewell*, Asst. Atty. Gen., and *Dennis R. Molock*, Deputy Atty. Gen., for appellee.

PER CURIAM. Petitioners Paul Ruiz and Earl Denton were convicted of capital murder in the Circuit Court of Logan County and sentenced to death. On appeal, we reversed the trial court's denial of a change of venue. *Ruiz & Denton v. State*, 265 Ark. 875, 582 S.W. 2d 915 (1979). On remand, the case was transferred to the Circuit Court of Conway County where verdicts of guilt were again returned and sentences of death imposed. We affirmed. *Ruiz & Denton v. State*, 275 Ark. 94, 617 S.W. 2d 6 (1981).

There is no need to recite the facts of this case since they are fully set out in the two previous decisions of this Court. Ruiz and Denton have now filed a petition for permission to proceed in circuit court for postconviction relief pursuant to Arkansas Criminal Procedure Rule 37. The petition was amended on February 16, 1982.

Rule 37 affords a remedy when the sentence in a case was imposed in violation of the constitution of the United States or of this State or "is otherwise subject to collateral attack." Rule 37.1; *Swisher* v. *State*, 257 Ark. 24, 514 S.W. 2d 218 (1974); *Thacker* v. *Urban*, 246 Ark. 956, 440 S.W. 2d 553 (1969); *Clark* v. *State*, 242 Ark. 584, 414 S.W. 2d 601 (1967). Rule 37 was not intended to provide a method for the review of mere error in the conduct of the trial or to serve as a substitute for appeal. *Swindler* v. *State*, 272 Ark. 340, 617 S.W. 2d 1 (1981); *Clark* v. *State*, 255 Ark. 13, 498 S.W. 2d 657 (1973). Even questions of constitutional dimension are not preserved beyond the direct appeal unless they present questions of such fundamental nature that the judgment is rendered void. *Swindler*, supra; *Hulsey* v. *State*, 268 Ark. 312, 595 S.W. 2d 934, reh. denied, 268 Ark. 315, 599 S.W. 2d 729 (1980). See also *Collins* v. *State*, 271 Ark. 825, 611 S.W. 2d 182 (1981) and *Rogers* v. *State*, 265 Ark. 945, 582 S.W. 2d 7 (1979). The grounds for relief presented by petitioners are alleged to raise issues so fundamental as to render the judgment void and open to collateral attack, but the issues were not raised in accordance with controlling rules of procedure and must be considered waived. See *Moore* v. *Illinois*, 408 U.S. 786 (1972); *Stembridge* v. *Georgia*, 343 U.S. 541 (1952); *Hulsey*, supra; *Williams* v. *Edmondson*, 257 Ark. 837, 250 S.W. 2d 260 (1975); *Orman* v. *Bishop*, 245 Ark. 887, 435 S.W. 2d 440 (1968).

Even though we find no ground for relief sufficient to render the judgment void, we will discuss the issues raised by petitioners since their first argument has never been raised before this Court. Petitioners allege that the Arkansas death penalty statute is "facially unconstitutional since it discourages assertion of the Fifth Amendment right not to plead guilty and penalizes exercise of the Sixth Amendment right to trial by jury." Petitioners argue that under Ark. Stat. Ann. § 41-1302 (1) (Repl. 1977) only the jury may impose the death penalty, thus creating a situation whereby a defendant can be assured of escaping execution only by waiving his right to a jury trial. As authority for their assertion that the statute places a chilling effect on a defendant's constitutional right to trial by jury, petitioners cite *United States* v.

Jackson, 390 U.S. 570, 885 S. Ct. 1209 (1968). *Jackson*, however, is not controlling.

The statute under attack in *Johnson* was the Federal Kidnapping Act which provided that interstate kidnappers "shall be punished (1) by death if the kidnapped person has not been liberated unharmed, and if the verdict of the jury shall so recommend, or (2) by imprisonment for any term of years or for life, if the dath penalty is not imposed." The District Curt held the death penalty clause of the act unconstitutional because it made the death penalty applicable only to those defendants who asserted their right to a trial by jury. The United States Supreme Curt upheld the District Court but the holding in *Jackson* has been eroded in recent decisions. Furthermore, we find that Ark. Stat. Ann. §§ 41-1301 — 1304 (Repl. 1977), which sets forth the procedures governing jury trials for persons charged with capital murder, does not place an impermissible burden on the exercise of the constitutional right to trial by jury. § 41-1302 provides that the jury shall impose a sentence of death if it returns certain written findings, but, unlike the court in *Jackson*, the trial judge is not required to impose the death penalty in every case in which the jury verdict prescribes it. *Collins* v. *State*, 261 Ark. 195, 548 S.W. 2d 106 (1977).

Arkansas Criminal Procedure Rule 31.4, Ark. Stat. Ann. Vol. 4A (Repl. 1977), provides:

> No defendant charged with a capital felony may waive either trial by jury on the issue of guilt or the right to have sentence determined by a jury unless:
> (a) the court in which the cause is to be tried determines that the waiver is voluntarily and freely proffered without compulsion or coercion; and
> (b) the prosecuting attorney, with the permission of the court, *has waived the death penalty*; and
> (c) the prosecuting attorney has assented to the waiver of trial by jury, and such waiver has been approved by the court.

Petitioners assert that this statutory scheme causes a de-

fendant to abandon his right to a jury trial in return for the assurance that he will not receive the death penalty. Petitioners ignore, however, the fact that the prosecutor must waive the death penalty with the permission of the court before the defendant may waive either trial by jury on the issue of guilt or his right to have sentence determined by a jury. There is no right to plead guilty or right to trial to the court, and petitioners are in error when they suggest that anything which may encourage a defendant to plead guilty is automatically suspect. Although petitioners do not mention plea bargaining, plea bargaining clearly encourages a defendant to waive a jury trial, but it is well settled that a plea bargain is not invalid per se merely because it is induced by fear of receiving the death penalty or because in agreeing to the plea bargain the defendant averts the possibility of receiving the death penalty. *Brady* v. *United States*, 397 U.S. 742, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970). The United States Supreme Court stated in *Corbitt* v. *New Jersey*, 439 U.S. 212, 99 S. Ct. 492, 58 L. Ed. 2d 466 (1978) (Stevens, Brennan and Marshall, JJ., dissenting):

> The cases in this court since *Jackson* have clearly established that not every burden on the exercise of a constitutional right and not every pressure or encouragement to waive such a right, is invalid. Specifically, there is no per se rule against encouraging guilty pleas. We have squarely held that a State may encourage a guilty plea by offering substantial benefits in return for the plea. *Corbitt*, at 218.

The fact that a defendant agrees to waive trial by jury on the issue of guilt or the right to have guilt determined by a jury because the court and state will waive the death penalty does not chill an accused's right to a jury trial. Rule 31.4 offers a protection for the accused who wishes to avoid a jury trial. It is difficult to see how petitioners were prejudiced by the procedural guidelines of which they complain. They do not claim that they wished to waive a jury trial but did not seek to do so because of the provisions which give the state the discretion to waive the death penalty with approval of the court. Indeed, such an argument would suggest that the petitioners wished to have the right to be sentenced to death

without a jury. The death penalty under Arkansas statutes has been consistently held constitutional, *Hulsey* v. *State*, 261 Ark. 449, 549 S.W. 2d 73 (1977); *Neal* v. *State*, 261 Ark. 356, 548 S.W. 2d 135 (1977); *Collins* v. *State*, 261 Ark. 195, 548 S.W. 2d 106, cert. den., 434 U.S. 977 (1977), and petitioners have not presented a valid attack to its constitutionality in their petition.

Petitioners' second allegation is ineffective assistance of counsel stemming from their joint representation by the same counsel during the penalty phase of trial. The record indicates that the petitioners were specifically questioned as to whether counsel had discussed a possible conflict of interest in joint representation. They each answered that they were so informed and had no objection to joint representation. Petitioners have offered no facts to support their allegation that their acquiescence was not intelligently and voluntarily given.

Petitioners argue that they were prejudiced by being co-defendants during the penalty phase because the jury was unable to discern the distinctions made between the two men and thus found no mitigating circumstances. No specific evidence of prejudice is provided. The jury was given separate verdict forms and instructed to decide separately as to each defendant. Petitioners have not demonstrated that the jury did not follow that instruction.

Petitioners cite the standard of review of the Eighth Circuit Court of Appeals on the issue of ineffective assistance of counsel. This Court, however, had adopted a somewhat different standard. We hold that there is a presumption of effective assistance of counsel and that a petitioner must overcome that presumption and show he was prejudiced by the conduct of counsel. A petitioner must also show by clear and convincing evidence that the prejudice which resulted from the representation of trial counsel was such that he did not receive a fair trial. *Blackmon* v. *State*, 274 Ark. 202, 623 S.W. 2d 184 (1981). Petitioners have not demonstrated that they were denied a fair trial.

Petition denied.

SUPREME COURT OF ARKANSAS

No. CR 80-147

MAR 29 1982

PAUL RUIZ & EARL DENTON
Petitioners

v.

STATE OF ARKANSAS
Respondent

PETITION FOR PERMISSION TO PROCEED IN CIRCUIT COURT UNDER CRIMINAL PROCEDURE RULE 37

PETITION DENIED

PER CURIAM

Petitioners Paul Ruiz and Earl Denton were convicted of capital murder in the Circuit Court of Logan County and sentenced to death. On appeal, we reversed the trial court's denial of a change of venue. Ruiz & Denton v. State, 265 Ark. 875, 582 S.W.2d 915 (1979). On remand, the case was transferred to the Circuit Court of Conway County where verdicts of guilt were again returned and sentences of death imposed. We affirmed. Ruiz & Denton v. State, 273, Ark. 94, 617 S.W.2d 6 (1981).

There is no need to recite the facts of this case since they are fully set out in the two previous decisions of this Court. Ruiz and Denton have now filed a petition for permission to proceed in circuit court for postconviction relief pursuant to Arkansas Criminal Procedure Rule 37. The petition was amended on February 16, 1982.

Rule 37 affords a remedy when the sentence in a case was imposed in violation of the constitution of the United States or of this State or "is otherwise subject to collateral attack." Rule 37.1; Swisher v. State, 257 Ark. 24, 514 S.W.2d 218 (1974); Thacker v. Urban, 246 A 956, 440 S.W.2d 553 (1969); Clark v. State, 242 Ark. 584, 414 S. 601 (1967). Rule 37 was not intended to provide a method for of mere error in the conduct of the trial or to serve as a for appeal. Swindler v. State, 272 Ark. 340, 617 S.W.2 Clark v. State, 255 Ark. 13, 498 S.W.2d 657 (1973). of constitutional dimension are not preserved be

unless they present questions of such fundamental nature that the judgment is rendered void. Swindler, supra; Hulsey v. State, 268 Ark. 312, 595 S.W.2d 934, reh. denied, 268 Ark. 315, 599 S.W.2d 729 (1980). See also Collins v. State, 271 Ark. 825, 611 S.W.2d 182 (1981) and Rogers v. State, 265 Ark. 945, 582 S.W.2d 7 (1979). The grounds for relief presented by petitioners are alleged to raise issues so fundamental as to render the judgment void and open to collateral attack, but the issues were not raised in accordance with controlling rules of procedure and must be considered waived. See Moore v. Illinois, 408 U.S. 786 (1972); Stembridge v. Georgia, 343 U.S. 541 (1952); Hulsey, supra; Williams v. Edmondson, 257 Ark. 837, 250 S.W.2d 260 (1975); Orman v. Bishop, 245 Ark. 887, 435 S.W.2d 440 (1968).

Even though we find no ground for relief sufficient to render the judgment void, we will discuss the issues raised by petitioners since their first argument has never been raised before this Court. Petitioners allege that the Arkansas death penalty statute is "facially unconstitutional since it discourages assertion of the Fifth Amendment right not to plead guilty and penalizes exercise of the Sixth Amendment right to trial by jury." Petitioners argue that under Ark. Stat. Ann. §41-1302 (1)(Repl. 1977) only the jury may impose the death penalty, thus creating a situation whereby a defendant can be assured of escaping execution only by waiving his right to a jury trial. As authority for their assertion that the statute places a chilling effect on a defendant's constitutional right to trial by jury, petitioners cite United States v. Jackson, 390 U.S. 570, 885 S.Ct. 1209 (1968). Jackson, however, is not controlling.

The statute under attack in Jackson was the Federal Kidnapping Act which provided that interstate kidnappers "shall be punished (1) by death if the kidnapped person has not been liberated unharmed, and if the verdict of the jury shall so recommend, or (2) by imprisonment for any term of years for life, if the death penalty is not imposed." The District Court held the death penalty clause of the act unconstitutional because it made the death penalty applicable only

to those defendants who asserted their right to a trial by jury. The United States Supreme Court upheld the District Court but, the holding in Jackson has been eroded in recent decisions. Furthermore, we find that Ark. Stat. Ann. §§41-1301-1304 (Repl. 1977) which sets forth the procedures governing jury trials for persons charged with capital murder, does not place an impermissible burden o the exercise of the constitutional right to trial by jury. §41-1302 provides that the jury shall impose a sentence of death if it returns certain written findings, but, unlike the court in Jackson, the trial judge is not required to impose the death penalty in every case in which the jury verdict prescribes it. Collins v. State, 261 Ark. 195, 548 S.W.2d 106 (1977).

Arkansas Criminal Procedure 31.4, Ark. Stat. Ann. Vol. 4A (Repl. 1977), provides:

> No defendant charged with a capital felony may waive either trial by jury on the issue of guilt or the right to have sentence determined by a jury unless:
> (a) the court in which the cause is to be tried determines that the waiver is voluntarily and freely proffered without compulsion or coercion; and
> (b) the prosecuting attorney, with the permission of the court, has waived the death penalty; and
> (c) the prosecuting attorney has assented to the waiver of trial by jury, and such waiver has been approved by the cou

Petitioners assert that this statutory scheme causes a defendant to abandon his right to a jury trial in return for the assurance that he will not receive the death penalty. Petitioners ignore, however, the fact that the prosecutor must waive the death penalty with the permission of the court before the defendant may waive either trial by jury on the issue of guilt or his right to have sentence determined by a jury. There is no right to plead guilty or right to trial to the court, and petitioners are in error when they suggest that anything which may encourage a defendant to plead guilty is automatically suspect. Although petitioners do not mention plea bargaining, plea bargaining clearly encourages a defendant to waive a jury trial, but it is well settled that a plea bargain is not invalid per se merely because it is induced by fear of receiving the death penalty or because in agreeing to the plea bargain the defendar averts the possibility of receiving the death penalty. Brady v. Uni

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> The cases in this Court since Jackson have clearly established that not every burden on the exercise of a constitutional right and not every pressure of encouragement to waive such a right, is invalid. Specifically, there is no per se rule against encouraging guilty pleas. We have squarely held that a State may encourage a guilty plea by offering substantial benefits in return for the plea. Corbitt, at 218.

The fact that a defendant agrees to waive trial by jury on the issue of guilt or the right to have guilt determined by a jury because the court and state will waive the death penalty does not chill an accused's right to a jury trial. Rule 31.4 offers a protection for the accused who wishes to avoid a jury trial. It is difficult to see how petitioners were prejudiced by the procedural guidelines of which they complain. They do not claim that they wished to waive a jury trial but did not seek to do so because of the provisions which give the state the discretion to waive the death penalty with approval of the court. Indeed, such an argument would suggest that the petitioners wished to have the right to be sentenced to death without a jury. The death penalty under Arkansas statutes has been consistently held constitutional, Hulsey v. State, 261 Ark. 449, 549 S.W.2d 73 (1977); Neal v. State, 261 Ark. 336, 548 S.W.2d 135 (1977); Collins v. State, 261 Ark. 195, 548 S.W.2d 106, cert. den., 434 U.S. 977 (1977), and petitioners have not presented a valid attack to its constitutionality in their petition.

Petitioners' second allegation is ineffective assistance of counsel stemming from their joint representation by the same counsel during the penalty phase of trial. The record indicates that the petitioners were specifically questioned as to whether counsel had discussed a possible conflict of interest in joint representation. They each answered that they were so informed and had no objection to joint representation. Petitioners have offered no facts to support

their allegation that thier acquiescence was not intelligently and voluntarily given.

Petitioners argue that they were prejudiced by being co-defendants during the penalty phase because the jury was unable to discern the distinctions made between the two men and thus found no mitigating circumstances. No specific evidence of prejudice is provided. The jury was given separate verdict forms and instructed to decide separately as to each defendant. Petitioners have not demonstrated that the jury did not follow that instruction.

Petitioners cite the standard of review of the Eighth Circuit Court of Appeals on the issue of ineffective assistance of counsel. This Court, however, had adopted a somewhat different standard. We hold that there is a presumption of effective assistance of counsel and that a petitioner must overcome that presumption and show he was prejudiced by the conduct of counsel. A petitioner must also show by clear and convincing evidence that the prejudice which resulted from the representation of trial counsel was such that he did not receive a fair trial. Blackmon v. State, 274 Ark. 202, 623 S.W.2d 184 (1981). Petitioners have not demonstrated that they were denied a fair trial.

Petition denied.

81-6976

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

NO. A-943

PAUL RUIZ and EARL DENTON — PETITIONERS

VS.

STATE OF ARKANSAS — RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION

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IN THE SUPREME COURT OF THE UNITED STATES
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TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION

Respondent, State of Arkansas, responds to petitioners' petition for writ of certiorari to the Supreme Court of Arkansas.

QUESTIONS PRESENTED FOR REVIEW

I. Whether the Arkansas death penalty statutory scheme is unconstitutional in discouraging assertion of the Fifth Amendment right not to plead guilty and needlessly penalizing exercise of the Sixth Amendment right to trial by jury.

II. Whether the State court should have allowed petitioners an opportunity to present and develop, in a postconviction proceeding, their claims of violations under the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

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OPINION BELOW

Contrary to the statement of petitioners that the opinion of the Supreme Court is unreported, it is reported. Ruiz & Denton v. State, 275 Ark. 410, 630 S.W.2d 44 (1982).

JURISDICTION

Respondent concedes that this Court has jurisdiction to review this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS

All constitutional and statutory provisions relied upon by respondent are included in the petition and will not be reiterated.

SUMMARY OF RESPONDENT'S ARGUMENT

I.

The Arkansas Supreme Court correctly construed the cases decided by this Court and decided that the line of cases beginning with Brady v. United States, 397 U.S. 742 (1970), controls, since that line of cases significantly modified the rationale underlying United States v. Jackson, 390 U.S. 570 (1968). The Arkansas statutory scheme for the imposition of the death penalty permits a capital defendant to plead guilty but requires discretionary action by both the prosecutor and the trial court before a jury trial on either guilt or penalty may be waived. This scheme is designed to protect the rights of a capital defendant not to chill the exercise of his right to jury trial.

II.

The Arkansas Supreme Court was justified in denying petitioners an evidentiary hearing in the trial court. The allegations regarding ineffective assistance of counsel in the penalty phase were vague and unsupported by sufficient factual allegations, and the record reflects that petitioners knowingly and intelligently acquiesced in joint representation by their attorneys. There was no showing of prejudice, which is required. This Court has never held that the States must afford any specific postconviction procedure, much less that they must afford postconviction evidentiary hearings to petitioners who make only speculative and conclusory allegations of possible prejudice.

REASONS FOR DENYING THE WRIT

I.

THE ARKANSAS DEATH PENALTY STATUTE IS NOT FACIALLY UNCONSTITUTIONAL SINCE IT DOES NOT UNCONSTITUTIONALLY DISCOURAGE ASSERTION OF THE FIFTH AMENDMENT RIGHT NOT TO PLEAD GUILTY NOR PENALIZE THE EXERCISE OF THE SIXTH AMENDMENT RIGHT TO TRIAL.

Respondent first submits that the Arkansas Supreme Court correctly analyzed United States v. Jackson, 390 U.S. 570 (1968), construed it with the line of cases which reflect the evolution of this Court's holdings on the permissible encouragement of guilty pleas, and came to the conclusion that Arkansas' statutory scheme for the imposition of the death penalty is not violative of the United States Constitution. Ruiz & Denton v. State, 275 Ark. 410, 630 S.W.2d 44 (1982).

Petitioners allege that the statutory scheme provides that the trial court may never impose a sentence of death. They do not, however, cite to any statutory authority for this proposition. Perhaps that is because the Arkansas statutes simply do not explicitly provide that prohibition.

It is interesting that petitioners have ignored the Arkansas Supreme Court's reliance on Brady v. United States, 397 U.S. 742 (1970), the first of the cases which began the evolutionary process away from this Court's holding in Jackson that a statute may not needlessly encourage guilty pleas. Brady made it clear that "a plea bargain is not invalid per se merely because it is induced by fear of receiving the death penalty or because in agreeing to the plea bargain the defendant averts the possibility of receiving the death penalty." Ruiz, 275 Ark. at 414.

While this Court has never explicitly overruled Jackson, Justice Stevens stated quite plainly in a later opinion that the "holding in Jackson. . .has been divorced from the rationale on which it rested," and that he therefore dissented from the "repudiation" of Jackson. Corbitt v. New Jersey,

439 U.S. 212, 229 (1978) (Stevens, Brennan & Marshall, JJ., dissenting).

The majority in Corbitt specifically held that the underlying rationale of Jackson was overruled:

> The cases in this Court since Jackson have clearly established that not every burden on the exercise of a constitutional right and not every pressure or encouragement to waive such a right, is invalid. Specifically, there is no per se rule against encouraging guilty pleas. We have squarely held that a State may encourage a guilty plea by offering substantial benefits in return for the plea.

Corbitt, 439 U.S. at 218.

The Supreme Court explained in Corbitt, that "plea bargaining by state prosecutors operates by virtue of state law, here by virture of the formal rules of the Supreme Court of New Jersey. That system permits a proper amount of leniency in return for pleas, leniency that is denied if one goes to trial." Corbitt, 439 U.S. at 224 n. 14. The Court further noted that it could not "hold that the legislature may not openly provide for the possibility of leniency in return for a plea." Corbitt, 439 U.S. at 224 n. 14. The discretion left to the prosecutor was emphasized at 220, at 224 n. 14 and that left to the trial court at 217-18, 222, 224 n. 14.

Others in that line of cases are McMann v. Richardson, 397 U.S. 759 (1970); Parker v. North Carolina, 397 U.S. 790 (1970), and Chaffin v. Stynchcombe, 412 U.S. 17 (1973). One of the strongest in that line is Bordenkircher v. Hayes, 434 U.S. 357 (1978).

In Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), cert. denied, 440 U.S. 976 (1979), the defendant alleged that a section of the Florida death penalty statute was being systematically used to induce guilty pleas, resulting in the same effect as the statute in Jackson. The Fifth Circuit quoted at length from Proffitt and Gregg, noting this Court's approval of the discretion which must necessarily be exercised by a prosecutor at various stages of any criminal prosecution, including capital cases. In rejecting the argument, it held at 608-09 (footnotes omitted):

> Second, the Supreme Court in Bordenkircher v. Hayes, 434 U.S. 357, 365, 98 S.Ct. 663, 669, 54 L.Ed.2d 604 (1978), recently held that plea-bargaining, in which the prosecutor openly presents a defendant with the unpleasant alternatives of pleading guilty to a lesser charge and foregoing trial or pleading not guilty and facing a more serious charge on which he plainly is subject to prosecution, and for which he would receive upon conviction life imprisonment, does not violate the Due Process Clause of the Fourteenth Amendment. The fact that the prosecutor's plea-bargaining tool in Bordenkircher was life imprisonment and in this case it allegedly is the death penalty is a distinction without a difference. Bordenkircher controls the instant case. See, e.g., Montgomery v. Estelle, 5 Cir., 1978, 568 F.2d 457. Finally, it is well settled that a plea bargain is not invalid per se because it is induced by fear of receiving the death penalty or because in agreeing to the plea bargain the defendant averts the possibility of receiving the death penalty. See, e.g., Brady v. United States, 397 U.S. 742, 747, 90 S.Ct. 1463, 1468, 25 L.Ed.2d 747 (1970). Thus, if Florida prosecutors actually are using the threat of the death penalty under Section 921.141 in their plea-bargaining to induce guilty pleas, the practice is permissible and the petitioner's contention is without merit. (Footnotes omitted.)

Even if, as petitioners allege, Ark. R. Crim. P. 31.4, Ark. Stat. Ann., Vol. 4A (Repl. 1977), appears to prohibit the imposition of the death penalty on capital defendants who waive a jury trial, it has one element which saves it from a violation of Jackson. Subsections (b) and (c) make it clear that the discretion of both the prosecutor and the trial court are involved in any decision which involves a waiver of jury trial. This Court's later cases have made it clear that the exercise of prosecutorial discretion, especially that specifically provided by statute or rule, to allow a defendant to mitigate the severity of the possible sentence as an inducement to aid the State's interest in avoiding trial, is perfectly permissible. That appears to be exactly the situation at which Rule 31.4 is aimed.

Jackson should not be allowed to prevent capital defendants from exercising the free exercise of their opportunity to "spare

themselves and their families the spectacle and expense of protracted courtroom proceedings," Jackson, 390 U.S. at 584, in exchange for the mitigation of their sentences, nor should it be permitted to prevent the prosecutor, in the exercise of his well-recognized discretion, from sparing the State the same ordeal. Rule 31.4 merely permits a defendant to waive his rights, with that waiver specifically protected by a requirement that the trial court find it "voluntarily and freely proffered without compulsion or coercion." It also specifically provides for the free exercise of prosecutorial discretion as to waiver of the death penalty. The trial court must then approve the waivers of both the death penalty and the right to trial. Much more importantly, however, Rule 31.4 assures a capital defendant who desires to waive jury trial that if that waiver is approved by the court, he is protected from the imposition of the death penalty. It is difficult to see how a State could more equitably provide for waiver of jury trial or how it could better provide protection for a capital defendant.

The most ridiculous part of this whole issue is that to strictly comply with petitioner's reasoning pursuant to Jackson, subsection (b) of Rule 31.4 would have to be eliminated. That would only omit any assurance to a defendant wishing to waive jury trial that he could not be executed. In light of later cases, surely this Court does not intend such a punitive result -- that a State may only allow a capital defendant to waive jury trial if it also assures him that he can be executed in spite of that waiver. To focus only on the narrow holding in Jackson, obviously based on specific factors of statutory construction and legislative history not present here, and to ignore the overwhelming authority of later cases specifically authorizing procedures provided in Rule 31.4 would be the epitome of elevating of form over substance.

II.

THE ARKANSAS SUPREME COURT PROVIDED PETITIONERS WITH CONSTITUTIONALLY ADEQUATE POSTCONVICTION REVIEW.

Petitioners devote the bulk of their argument under Point II to the Arkansas Supreme Court's holding that the issue of ineffective assistance of counsel at the penalty phase was procedurally barred. Actually, the Court held that both issues presented were procedurally barred because of petitioners' failure to raise them to the trial court. Since the Court then proceeded to reach the merits of both issues, Ruiz, 275 Ark. at 412, review by this Court is not barred, and petitioners were not faced with the "impossible dilemma" they describe.

Thus, petitioner's only viable argument, after the procedural bar assertions are eliminated, is that they were not afforded a hearing on their petition for Rule 37 relief. Respondent submits that the Arkansas Supreme Court properly denied petitioners a hearing in State trial court because it essentially gave them one by reaching the merits of the ineffective assistance issue themselves. This Court has made it clear that a fact-finding procedure in a State appellate court is considered a "hearing" for purposes of federal habeas corpus review. Sumner v. Mata, 101 S.Ct. 764 (January 21, 1981). It is no less a "hearing" for Rule 37 purposes, especially since Rule 37 is a postconviction review procedure similar to federal habeas corpus.

This Court has never held that the Constitution compels the states to provide specific postconviction procedures to persons claiming violations of their federal constitutional rights. Carter v. Illinois, 329 U.S. 173 (1946). Rather, this Court has stated that although the Constitution commands the states to assure fair judgment, wide discretion is left to the states in deciding the manner of adjudicating a claim that a conviction is unconstitutional. Young v. Ragan, 337 U.S. 235, 238 (1948); Hysler v. Florida, 315 U.S. 411 (1946). As

the Court stated in Carter, 329 U.S. at 175-76:

> Wide discretion must be left to the States for the manner of adjudicating a claim that a conviction is unconstitutional. States are free to devise their own systems of review in criminal cases. A State may decide whether to have direct appeals in such cases, and if so under what circumstances. . . .In respecting the duty laid upon them by Mooney v. Holohan, States have a wide choice of remedies. A State may provide that the protection of rights granted by the Federal Constitution be sought through the writ of habeas corpus or coram nobis. It may use each of these ancient writs in its common law scope, or it may put them to new uses; or it may afford remedy by a simple motion brought either in the court of original conviction or at the place of detention. . .So long as the rights under the United States Constitution may be pursued, it is for a State and not for this Court to define the mode by which they may be vindicated. [Citations omitted.]

This philosophy was reaffirmed in Young, 337 U.S. at 238, wherein it was emphasized that "Illinois may choose the procedure it deems appropriate for the vindication of federal rights." The most revealing statement of the deference afforded states in fashioning postconviction remedies is found in Justice Jackson's concurring opinion in Brown v. Allen, 344 U.S. 443, 541 (1953) (emphasis added):

> The states all allow some appeal from a judgment of conviction which permits review of any question of law, state or federal, raised upon the record. No state is obliged to furnish multiple remedies for the same grievance. Most states, and with good reason, will not suffer a collateral attack such as habeas corpus to be used as a substitute for or duplication of the appeal. A State properly may deny habeas corpus to raise either state or federal issues that were or could have been raised on appeal. Such restriction by the state should be respected by federal courts.

In Hysler, an individual convicted of murder sought a writ of coram nobis from the Supreme Court of Florida which had affirmed his conviction on direct appeal three years earlier. The Florida Supreme Court refused to grant the petition. The United States Supreme Court granted certiorari on the question of whether due process had been denied the petitioner because of the alleged use of perjured testimony by the prosecution at trial. In affirming the denial of the writ, the Court found that Florida's postconviction process met the requirements of due process.

Describing the case as an "unedifying story in the administration of criminal justice," id. at 415, the Court noted that the petitioner raised his claim "after leaden-footed justice had reached the end of the familiar trial of dilatory procedure." Id. at 417. The Court held at 422:

> However ineptly the Florida Supreme Court may have formulated the grounds for denying the application, its action leaves no room for doubt that the Court deemed the petitioner's claim without substantial foundation. We construe its finding. . .to mean that the petitioner had failed to make the showing of substantiality which, according to the local procedure of Florida, was necessary in order to obtain the extraordinary relief.

Petitioners have failed to raise an issue of constitutional magnitude because this Court has never held that the State equivalent of habeas corpus review is required under the United States Constitution; it has held that where such opportunity for relief is afforded, the scope of that review and the procedure by which relief may be granted is within the discretion of the State.

Despite the allegations of petitioners, there is simply no difference between the trial court's review of the files and records and the entering of written findings and the Arkansas Supreme Court's written findings in this case. In short, there is no unconditional right pursuant to the United States Constitution to a postconviction evidentiary hearing in the trial court. Any such opportunity granted by the Arkansas Supreme Court is based on the substance and strength of the grounds alleged. The exercise of that discretion by the Arkansas Court is similar to the discretion of the Florida Supreme Court in Hysler.

Petitioner filed his Rule 37 petition pursuant to Rule 37.2 (a) after having already prosecuted a direct appeal to the Arkansas Supreme Court. That provision requires the permission of the Arkansas Supreme Court before the defendant may return to the trial court with his contentions. The logical purpose of this provision is obvious: Rule 37 is designed to afford the opportunity for relief to those defendants who have not

otherwise had an opportunity for review of the claims of constitutional deprivation. It is not intended as a second appeal procedure. Collins v. State, 271 Ark. 825, 828, 611 S.W.2d 182 (1981).

Petitioners also argue that the Arkansas Supreme Court's standard of ineffective assistance is in conflict with that of the Eighth Circuit Court of Appeals. Even if that were true, which respondent does not concede, petitioners' allegations would have no merit if reviewed under the Eighth Circuit standard. (While petitioners urge that "prejudice" is not the issue, that would certainly be the issue if the Eighth Circuit were reviewing the allegations. Petitioners have conveniently neglected to provide this Court with the complete Eighth Circuit standard, which includes a showing of prejudice, United States v. Bad Cob, 560 F.2d 877, 880 (8th Cir. 1977); United States v. Easter, 539 F.2d 663, 666 (8th Cir. 1976); McQueen v. Swenson, 498 F.2d 207, 220 (8th Cir. 1974), and at least a showing of dereliction of duty, Zaehringer v. Brewer, 635 F.2d 734 (8th Cir. 1980); United States v. Rhoads, 617 F.2d 1313 (8th Cir. 1980).

The Arkansas Supreme Court properly found that petitioners were specifically apprised of a possible conflict of interest in joint representation, were questioned about it in front of the trial court, and intelligently and voluntarily acquiesced to joint representation. Ruiz, 275 Ark. at 415. Actually, petitioners apparently insisted on joint representation.

Petitioners conceded in their Rule 37 petition that neither they nor their attorneys ever requested a severance of defendants but alleged that they did not knowingly and intelligently waive their right to separate representation. They also conceded that they were specifically asked if they had been apprised by counsel of a possible conflict in joint representation. One defense attorney questioned petitioners for the record, stating that the attorneys wanted the record to reflect that they had discussed at length with the defendants any possibility there might be a conflict because both attorneys represented both

petitioners. He also stated that after a third attorney came into the case, they again discussed with petitioners at length any possible conflict by the third attorney representing both of them. Both petitioners then confirmed that the matter had been discussed with them at length and both denied any objection to being jointly represented.

This dialogue indicates that petitioners were advised, apparently repeatedly, by their counsel that either or both might be prejudiced by joint representation (or joint trial). Apparently, petitioners chose to proceed through both the guilt and penalty phases with joint representation. Respondent submits that the colloquy above is sufficient to show a knowing and intelligent waiver of severance by both petitioners.

It is also significant that petitioners had three appointed attorneys at trial. Even more significantly, those attorneys were apparently keenly aware of the possibility of a conflict in joint representation. The State certainly did not shirk its responsibility to provide adequate counsel for petitioners. Had there been any real conflict, it would seem a simple matter for the attorneys to bring this to the trial court's attention, give the grounds for a severance and request that the duties of representation be equitably divided among the attorneys in a manner that would eliminate any possibility of a conflict. Since they did not do so, it can only be presumed that petitioners preferred to be tried together.

Petitioners have made only vague and conclusory allegations with regard to any prejudice they might have suffered. They allege that they have "dissimilar" backgrounds and psychological profiles and that their past criminal backgrounds are distinguishable. They also argue that there might have been a differing degree of culpability in the crimes. These allegations are not based on any factual allegations of specific evidence that could have been, but was not, introduced because of the joint trial.

Petitioners' present counsel concedes that "no specific evidence was provided" to the Arkansas Supreme Court with regard

to the alleged conflict of interest, blaming the insufficiency of the allegations on her own potential conflict of interest in representing both. In short, petitioners admit that they did not provide the Arkansas Supreme Court with sufficient factual allegations on which to base a finding that an evidentiary hearing was justified. These contentions by present counsel raise another interesting question: If joint representation is so detrimental and if petitioners' counsel is so highly cognizant of the possibility of a conflict of interest, why are petitioners still jointly represented, unless it is by their own choice? This continued joint representation belies their vague and conclusory allegations of conflict of interest.

It is highly significant that there was individual consideration of the petitioners during the penalty phase. Petitioners called four witnesses to testify to mitigating circumstances. All four testified to information about each petitioner. The trial court read and the jury was given separate verdict forms for each petitioner, and the trial court instructed the jury to "decide separately as to each defendant." In closing argument in the penalty phase, one of the attorneys read a poem written by Ruiz and discussed the individual backgrounds of each man.

The Arkansas Supreme Court upheld on appeal the jury's findings of no mitigating circumstances as to either defendant, Ruiz & Denton v. State, 273 Ark. 94, 104, 617 S.W.2d 6, cert. denied, 70 L.Ed.2d 631 (1981). The jury also found all five submitted aggravating circumstances to exist for each petitioner.

In view of what might be termed petitioners' demonstrated determination to be tried together, despite their attorneys' repeated warnings, the trial attorneys had two options: (1) continuing with joint representation, as their clients wished; or (2) withdrawing from the case. Respondent knows of no authority for the proposition that an attorney, in order to be effective, must insist on exercising his own judgment in spite of his client's demand to do things differently.

The attorneys brought the matter to the trial court's attention, presumably to get their clients' waivers on record. The trial court apparently saw no reason to order, sua sponte, a severance at that late date in the trial, and petitioners advance no reasonable argument that it had a duty to do so. The attorneys were neither ignorant of the possible consequences of joint trial nor derelict in acceding to their clients' wishes.

The Arkansas Supreme Court reviewed petitioners' allegations, made findings of fact based on the record and found that they did not raise issues requiring an evidentiary hearing. That holding was firmly based on prior interpretation of the purpose and scope of Rule 37 review, as well as on the substance of the allegations themselves. Petitioners are not entitled to more.

CONCLUSION

The Arkansas Supreme Court correctly decided the issues presented by petitioners in their Rule 37 petition. The Brady line of cases, including Corbitt and Bordenkircher, control the first issue since they have significantly modified the rationale of Jackson. The Arkansas Supreme Court was not required to afford petitioners a hearing on the ineffective assistance issue, especially since petitioners presented no factual allegations sufficient to justify a hearing and since the court found that the record reflected that they had knowingly and intelligently acquiesced in the procedure.

Respectfully submitted,

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